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September 15, 2011

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Mr. Steve Arwood
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Re: Workers Compensation Legislation
Meeting: September 22, 2011 at 8:00 a.m.

Gentlemen:

My colleague, attorney Roy Portenga, of Muskegon, and I, thank you for granting Michigan Association for Justice's request that the Administration meet with us so that we can express the deep concerns which we have concerning developments in the workers compensation system. I understand that we have been granted two hours to express our concerns and lay out proposed resolutions. The purpose of this letter is to give you some preliminary background information and structure along with the hope that this may free up some time for meaningful exchange and discussion. I am thankful that you have asked Director Elsenheimer to be present. Although he is new to the system and thus, may not appreciate all of the nuances and intricacies involved in the life of litigated and unlitigated claims, I have noticed that he is a very quick study. Indeed, he has, himself, identified and is administratively pursing what I suspect will be significant improvements in the system; most notably with electronic fund transfers and with what has often been described as: "*evidence based medicine*". These improvements alone are likely to result in significant savings for employers/workers compensation insurance carriers. Even without these improvements, the raw workers compensation premium rate for 2012 will be 7.4% less than 2011, per Director Hilfinger's recent press release. This reduction reflects the basic trend in workers comp exposure over the last several years.

Roy Portenga and I have represented disabled workers for many years. We have asked two workers compensation insurance defense attorneys to accompany us when we meet with you. We have asked them to come as witnesses from the defense bar and with the hope that they will perhaps be available to you for corroboration. All four attorneys are respected and

have had extensive experience with the workers compensation system. Amongst the four of us, there is approaching 150 years of experience.

BACKGROUND – Grand Bargain:

The workers compensation system, which was adopted in 1911, was the result of a grand bargain whereby employees gave up their tort rights to sue their employers for damages when the employer was negligent in return for a promise that the disabled workers would promptly be paid wage loss (80% after tax) and medical coverage for the injury, regardless of fault. Under this grand bargain, employers are immune to lawsuits from injured employees even if they are admittedly at fault. On the other hand, employees are granted workers compensation benefits (limited as they are) regardless of fault. The benefit of this grand bargain will be emasculated if our main concern (see below) comes to fruition.

MAIN CONCERN:

Although over the last several years there have been many issues and adverse developments in the workers compensation system which have resulted in inefficiencies entailing unnecessary expenses and undue delays, ***one recent development by itself brings us to you.*** It carries with it not only unnecessary harm and unfairness, but likely implosion of the system with many presumably unintended consequences. Let me simply refer to this issue as the *Lofton/Harder* issue. For as long as the workers compensation system has been in existence (since 1911), employers/carriers have been able to reduce their exposure by offering favored work to their disabled employee. This incentive keeps disabled employees working and also increases the employer's interest in monitoring and following the employee's progress. There are literally thousands of workers in the State of Michigan who are currently working at favored work despite their partial disabilities and work related restrictions. The two key sections of the Workers Disability Compensation Act, which have allowed employers to take credit for the wages which disabled workers are able to earn, read as follows:

> Sec. 301(5)(b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is ***able to earn*** after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.
>
> Sec. 361(1) While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of

> the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is ***able to earn*** after the personal injury. . .

Please note that I have, with italics, emphasized the phrase: "able to earn" in these two sections. Orders recently issued by the Supreme Court in a few cases in June, 2011, have clearly telegraphed that soon the High Court will be interpreting this language to apply not just to wages that a disabled worker is actually earning, but also to what an employee is "capable" of earning. I have attached a copy of the *Lofton* Order. Please note that even though it references Section 361(1), it does not use the statutory phrase, "able to earn", but uses a broader phrase: "capable of earning":

> "If it is found that the plaintiff is disabled under MCL 418.301(4), but that the limitation of wage earning capacity is only partial, the magistrate shall compute wage loss benefits under MCL 418.361(1), based upon what the plaintiff remains **capable of earning**." (emphasis added)

Some are naively hoping that by this, the Court is merely referencing a disabled employee who has not been "capable of finding" other work despite good faith efforts. However, most of us anticipate that employers will soon be allowed an outright deduction for what the disabled employee may theoretically be able to earn despite good faith efforts to find work. This, of course, would remove all incentives from the employer to accommodate partially disabled workers will increasingly find themselves jobless and dependent upon public assistance to make ends meet.

If the above was not enough, a couple months ago, a document entitled "Proposed Revisions to Michigan's Workers' Disability Compensation Act" (unknown author) surfaced. I attach a copy of it for you. It is believed that this is the document, which according to the May, 2011 minutes posted on-line at the Michigan Self-Insurers Agency's website, was being passed out to its board members. Hopefully, it is just a coincidence that the recent Supreme Court Orders were issued only weeks thereafter. It is anticipated that these proposed revisions in some form will be introduced in one of the Houses some time soon. We have not, with certainty, been able to identify the author, the proponents, or the potential sponsor. We believe that the original intent was to introduce it quickly with the hope of passing it and putting it on the Governor's desk before everyone could appreciate the consequences. The enclosed "proposed revisions" contain language which will clearly allow an employer to subtract the theoretical wage earning capacity. Because there are plenty of simple sedentary jobs which pay entry level wages up to approximately $10 per hour, it follows that every claim, other than the quadriplegic's, will be reduced by 80% of after tax earnings at $10 or less per hour. Indeed, in some cases, the reduction may be even greater depending on the employee's underlying skills and retained

physical capacity. Consider the following examples (based upon the 2010 Weekly Benefit Tables):

1. A 55 year old married construction worker with one dependent child, is making $20 per hour at the time of injury. A wall collapses on him, injuring his back, resulting in a lumbar laminectomy, leaving him with scar tissue impinging on the nerve root with permanent radiculopathy down his leg. He is limited to sedentary work with a sit/stand option and lifting no more than 10 lbs.

    - Hourly rate: $20.00
    - Average weekly wage (AWW)(40 hours): $800.00
    - After tax wages: $635.51
    - Workers comp amount (80% after tax): $508.41

2. A 45 year old single mother of three children is working in a factory making $15 per hour. She sustains a twisting knee injury at work after being hit by a hi-lo. Medical care follows, resulting in a meniscectomy, which eventually develops to bone on bone arthritis. She is limited to sedentary work.

    - Hourly rate: $15.00
    - Average weekly wage (40 hours): $600.00
    - After tax wages: $492.11
    - Workers comp amount (80% after tax): $393.69

3. A 38 year old married father of two children is employed as a machine operator making $12 per hour. He sustains a crush injury to his dominant hand. He is permanently limited him to left handed work, with the right hand as an assist.

    - Hourly rate: $12.00
    - Average weekly wage (40 hours): $480.00
    - After tax wages: $412.27
    - Workers comp amount (80% after tax): $329.82

4. A 60 year old widow works as a cashier at a department store, making $8.00 per hour. She slips and falls at work, injuring her back. She is thereafter limited to sit down work only.

    - Hourly rate: $8.00
    - Average weekly wage (40 hours): $320.00
    - After tax wages: $260.00
    - Workers comp amount (80% after tax): $207.98

In each of the above examples, you will see that the partially disabled employee is, under the current law, entitled to 80% of after tax wages of what their average weekly wage was at the time of injury. Under the current law, if any of these workers were to be accommodated by the employer, or find work on their own, the rate would be reduced by 80% of the after tax earnings at the new job. If, however, the employer is entitled to subtract the theoretical wages that the employee ***might*** be able to do, the benefit would be significantly reduced; regardless of whether the employee is working or not. It does not take much of an imagination to picture a sit down security guard job paying $9.00 per hour, which each one of the above employees would be able to do. For calculation purposes, let's assume that this worker has no dependents. Then the 80% after tax reduction that the employer would be entitled to for the theoretical wages would be as follows:

- Hourly rate: $9.00
- Average weekly wage (40 hours): $360.00
- After tax wages: $289.17
- Workers comp amount (80% after tax): $231.34

Thus, for each of the above workers, a $231.34 reduction of their workers comp rate would reduce it as follows:

1. Construction Worker (AWW $800):
   - Workers comp amount (80% after tax): $508.41
   - Less the theoretical reduction: -231.34
   - Presumed recalculated work comp rate: $277.07

2. Factory Worker (AWW $600):
   - Workers comp amount (80% after tax): $393.69
   - Less the theoretical reduction: -231.34
   - Presumed recalculated work comp rate: $162.35

3. Machine Operator (AWW $480.00)
   - Workers comp amount (80% after tax): $329.82
   - Less the theoretical reduction: -231.34
   - Presumed recalculated work comp rate: $98.48

4. Cashier (AWW $320.00)
   - Workers comp amount (80% after tax): $207.98
   - Less the theoretical reduction: -231.34
   - Presumed recalculated work comp rate: -$23.36

Rhetorical question: How many of these workers who normally would not have gone to see a lawyer will now go?

Consequences

The negative consequences of the disincentive for employers to accommodate their disabled employees can be summarized under three categories:

Impact on the State:

- Increased unemployment claims.
- Increased number of impaired workers looking for work.
- Increased number of impaired workers looking for Medicaid.
- Increased number of impaired workers looking for general assistance. The recent four year limitation to general assistance will probably not apply to these individuals because they are, by definition, disabled.
- Budget increases for the Workers Compensation Agency to accommodate increased number of workers compensation claims – almost every workers compensation claim (including 95% of the people who normally never see a dispute and go back to work) will experience a significant reduction in wage loss benefits based upon a very subjective standard – almost every case will be a potential case for litigation concerning the amount that ought to be deducted.
- Increased evictions/foreclosures because partially disabled workers will not be able to meet their basic needs.

Impact on Employers:

- Increased number of litigated cases.
- Increased litigation costs – each side of the case will have to hire vocational experts to testify concerning the labor market and the jobs that the claimant might, theoretically, be able to do.
- Increased group health insurance premiums as injured workers attempt to shift workers compensation claims towards group health insurance.
- Increased premiums for short term disability and long term disability policies (as injured workers choose to pursue such claims in lieu of workers compensation).
- Increased unemployment experience ratios.
- Hassle of dealing with delayed and burdened workers compensation proceedings as the magistrates have to deal with an additional issue of the "retained wage earning capacity".

Impact on Disabled Workers:

- Fear of employment termination.
- Employment termination.
- Unable to financially provide for the basic needs of worker and family.
- Increased evictions, foreclosures and bankruptcies.
- Increased need for an attorney.

- Increased litigation costs for vocational counselor testimony similar to the employers/carriers' exposure above.

The above negative consequences hardly seem worth the additional presumed reduction of the workers compensation premium, particularly when it's so unnecessary and when workers compensation is not even on the radar screen for most employers. There are many savings that could be had in ways other than removing the incentive to accommodate.

SIMPLE SOLUTION TO AVERT CATASTROPHE:

The simplest and easiest way to avert this catastrophe is to make the following simple changes in the two sections cited above:

> Sec. 301(5)(b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee ~~is able to earn~~ ***actually earns*** after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.
>
> Sec. 361(1) While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee ~~is able to earn~~ ***actually earns*** after the personal injury. . .

If you share our great concern, we would very much appreciate it if the Administration would champion the proposed statutory relief. We believe that it is the right thing to do. We believe that it will avoid potential catastrophic consequences. We also recognize the political realities. For this reason, many attorneys have been looking to offer other improvements in the system which will result in reduced exposure for the business community. Recently, the Council of the Workers Compensation Section of the State Bar set up a special committee to review the Workers Disability Compensation Act and try to find areas for streamlining and improving the system. I was privileged enough to be on that 10 person committee. I can assure you that all five of the plaintiff's lawyers on that committee recognized that any suggested improvements would have to benefit the business community. We believe that many good suggestions came out of that committee. The Council recently approved the suggestions. Those suggestions are still being touched up and will be available to you. I have been very much involved in trying to

find a reasonable political solution to these problems. I, and many others, remain available to you.

Respectfully,

Themis J. Fotieo

Enclosures:
- *Lofton* Supreme Court Order
- Proposed Revisions (author unknown) – this is the draft that surfaced a few months ago and purports to merely codify, but goes well beyond.
- Michigan Workers Compensation Statistics
- ODG–Evidence Based Medicine (this was given to me by Director Kevin Elsenheimer, which is basically a set of protocols for medical treatment which claim to be effective in reducing both medical and wage loss expenses. This is an Ohio study which claims significant reductions in both wage and medical exposures).
- Director Hilfinger's Press Release, re: 7.4% Drop in Raw Workers Comp Rate for 2012
- Eliminate: *Sington/Lofton* Memo–this is a 21 page memo which I drafted analyzing the proposed revisions with commentary. Please excuse some of the rhetoric as this was intended to be a clarion call.
- Memo re: Workers Comp Legislation to a Positive Effect (Talking Points)
- *Lofton* Bullets (Talking Points)
- Fotieo Work Comp Statutory Suggestions for Revision (4th draft). This was my effort to try to come up with language to help streamline the workers compensation system not only for the *Lofton/Harder* issue, but also for the expansive time consuming and delaying *Sington/Stokes* issue.
- Michigan Workers Comp Emergency Memo – although this memo does describe the *Lofton* problem, it also, in greater detail, describes the *Sington/Stokes* issue which should probably be dealt with if we are to have some statutory relief on the *Lofton/Harder* issue.

Cc: Kelvin Elsenheimer, Workers Compensation Agency
Roy Portenga
Jane Bailey, MAJ

SOME SUGGESTIONS AS TO HOW TO STATUTORILY DEAL WITH *LOFTON/HARDER* AND *SINGTON STOKES*

Themis Fotieo

LOFTON/HARDER

Alt. Language

301(5)(b) If an employee is employed and the ~~average~~ weekly wage of the employee is less than ***the average weekly wage*** ~~that which~~ the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax ***average*** weekly wage before the date of injury and the after-tax weekly wage which the injured employee ***actually earns*** ~~is able to earn~~ after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

418.361 Partial ~~incapacity for work~~ *wage loss*; amount and duration of compensation; effect of imprisonment or commission of crime; scheduled disabilities; meaning of total and permanent disability; limitations; payment for loss of second member.

(1) While the ~~incapacity for work~~ ***wage loss*** resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax ~~average~~ weekly wage which the injured employee ***actually earns*** ~~is able to earn~~ after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.

SINGTON/STOKES

HOW DO WE DEFINE "DISABILITY" SO THAT IT IS A FAIR STANDARD FOR ALL *AND* WHERE ALL PARTIES CAN AVOID THE EXPENSIVE COSTS OF VOCATIONAL ANALYSIS/TESTIMONY (WHICH, SINCE *STOKES,* IS NOW NECESSARILY REQUIRED). WHAT FOLLOWS ARE TWO ALTERNATIVE EFFORTS TO DELIVER THE BASIC *SINGTON* CONCEPT WITHOUT THE NEED FOR VOCATIONAL TESTIMONY. THERE MAY WELL BE OTHER GOOD WAYS TO ACCOMPLISH THIS. THE FIRST ALTERNATIVE FOCUSES MERELY ON THE EXERTIONAL REQUIREMENTS OF THE JOBS IN THE LAST 15 YEARS. THE SECOND ALTERNATIVE WAS SUGGESTED TO ME BY A RESPECTED DEFENSE ATTORNEY. THE SECOND ALTERNATIVE SEEMS TO BE WHAT THE PRACTICE WAS AFTER *SINGTON* FIRST CAME DOWN AND BEFORE *STOKES.* IT SEEMS TO BE PRETTY MUCH WHAT THE COURT OF APPEALS AND THE APPELLATE COMMISSION WERE SAYING BEFORE *STOKES* ADDED THE NECESSITY FOR MORE PROOFS. MY RECOLLECTION IS THAT BOTH THE PLAINTIFF AND DEFENSE BAR ACCEPTED THAT AS A FAIR METHOD. IN THIS SECOND ALTERNATIVE THERE IS LANGUAGE WHICH ALLOWS A MAGISTRATE TO FIND THAT THE THERE ARE NO OTHER AVAILABLE JOBS IF HE FINDS THAT THE EMPLOYEE ENGAGED IN "GOOD FAITH JOB SEARCH EFFORTS" PLEASE REVIEW BOTH ALTERNATIVES TO SEE IF ANY TWEAKING IS NEEDED TO GET US TO FAIRNESS AND SIMPLICITY. IF YOU CAN THINK OF BETTER ALTERNATIVES BRING THEM TO THE ATTENTION OF THE SECTION COMMITTEE.

ALTERNATIVE 1:

(4)(***a***) As used in this chapter, "disability" means a limitation of an employee's ***ability to perform his or her job at the time of injury as well as any other job the employee held within the 15 years before the date of injury, if such other job paid as much or more***.

(b) An employee making a claim for benefits under this act, shall, upon request of the employer, disclose the names and addresses of his employers for the 15 years prior to the date of the injury and for each such employer shall give a description of the wages provided and level and duration of exertion required in the jobs performed during that period. The employee shall also, if requested by the employer, authorize past employers to provide the same information. All employers subject to this act shall, upon written request, promptly complete and return to both the requesting employer and the employee any agency approved forms

designed to disclose this information. If requested by the employer, the employee shall authorize the Social Security Administration to release an itemized statement of earnings designed to identify the names and addresses of his employers for the 15 years prior to the injury.

(c) Pursuant to section 221, the Director of the Workers' Compensation Agency shall create one or more forms designed to facilitate the disclosure and release of information for the efficient administration of subsection 301(4). The director shall also create designed to facilitate an employer's section 301(5)(g) notice, and to facilitate the documentation by an employee of his job search efforts. The forms created by the agency shall contain a brief description of the relevant rights and obligations and possible legal consequences in the event of noncompliance.

Commentary re **above:** Subsection 301(4) delivers the basic Sington concept without the burden and cost of hiring vocational counselors. The 15 year rule, eliminates the ancient irrelevant minutia. Subsections (b) and (c) will help facilitate the prompt acquisition of information. Obviously the employer will not need this information in most cases, where the employee is likely to be going back to work within a reasonable period of time. If the forms created by the agency contain a brief section of rights and obligations, there is a greater likelihood of prompt compliance. Armed with formal agency job search forms, the employer may be able to get as much if not more of a real job search on the part of the employee as they might by having to hire a voc counselor

ALTERNATIVE 2:

(4) As used in this chapter, "disability" means a limitation of an employee's ***ability to perfom his or her job at the time of injury as well as any other available jobs that pay as much or more than the job he was performing at the time of injury. Good faith job search efforts may be determined by the magistrate as evidence that no such jobs are available.***

Commentary re Alternative 2: With this definition we would not need to include subsections (2) and (3). Obviously the employer could send the employee all sorts of job leads which would impact the judge's assessment of the "good faith". This alternative section seems to not require vocational testimony. The phrase "wage earning capacity", which is what gives life to Stokes, has been removed and thus it could be argued that Stokes is no longer operative. But this legislation is not being proposed in a vacuum. Therefore, does this need to be tweaked? If this alternative if found preferable, then we should move the following sentence into proposed section 310(5(f):

Pursuant to section 221, the Director of the Workers' Compensation Agency shall create one or more forms designed to facilitate an employer's section 301(5)(f) notice, and to facilitate the documentation by an employee of his job search efforts. The forms created by the agency shall contain a brief description of the relevant rights and obligations and possible legal consequences in the event of noncompliance.

ALTERNATIVE 3:

Michigan Businesses to Benefit from Decrease in Worker's Comp Rates

Contact: Mario L. Morrow 517-373-9280
Agency: Licensing and Regulatory Affairs

August 4, 2011 - ***Director Steven H. Hilfinger announced today good news for Michigan's businesses as the pure premium advisory rates for worker's compensation insurance will drop by an average of 7.4 percent.***

The decrease in the premium rate signifies a lower trend for worker's compensation insurance rates in Michigan.

"The decline in the state's pure premium rate for worker's compensation is great news for Michigan employers and ultimately employees and job seekers." Hilfinger said. "We are working very hard to create a positive environment for creating business in Michigan."

Workers Compensation Agency Director Kevin Elsenheimer said the drop in average rates for 2011 is likely due in part to a reduced number of work-related injury claims due to well-developed safety programs and a fee schedule which controls medical costs for work-related injuries and is revised annually by the state's Worker's Compensation Agency, which is housed in the Michigan Department of Licensing & Regulatory Affairs (LARA). LARA is serving in the leadership role of reinventing the state's regulatory and licensing environment that is "Customer Driven, Business Minded."

"Our worker's compensation program is doing an effective job of cost containment," said Worker's Compensation Agency Director Kevin Elsenheimer. "Reducing workers' compensation rates helps businesses reduce their operating costs, making it easier to do business in our state and potentially lead to economic growth and creating jobs for Michigan workers."

The state's quasi-public Data Collection Agency Board approved the 7.4 percent reduction in the average pure premium rate on July 27, 2011 to be effective January 1, 2012. The rate is the annual yardstick against which private insurance carriers can compare their rate structure for worker's compensation coverage for the coming year.

The pure premium rates are developed by examining historical loss data reported by insurance carriers for individual job classes and then analyzing how the data will be affected on a year-to-year basis by any law changes or court decisions.

For more information about LARA, please visit www.michigan.gov/lara. Follow us on Twitterwww.twitter.com/michiganLARA, "Like" us on Facebook or find us on YouTubewww.youtube.com/michiganLARA.

Premium Drop

Outcomes Data: Ohio 2005

- ODG adopted statewide in Ohio by BWC in November 2003
- Pilot study by CompManagement, Inc. (a leading MCO)
- Medical costs reduced 64%, lost days reduced 69%
- Treatment delay reduced 77% (#1 benefit – early care for injured workers)

Ohio BWC Official Disability Guidelines Diagnosis Related Authorization Pilot. Average Lost Days and Average Medical Costs per Diagnosis (CompManagement, Inc. 07/22/05)

	Med. Costs	Lost Days
Pre-ODG	$7,298,522	116,729
Post-ODG	$2,655,338	36,143
Savings	64%	69%

savings

Ohio 2005 (cont'd)
Provider Feedback: Doctors Liked It!

- *"I think this program sounds like it will become a time saving & effective tool in bettering or improving the current process."*
- *"Best part was that the injured worker did not have to wait for the treatment. Also cut down on paperwork."*
- *"These innovative methods must be supported & further explored."*
- *"Would like to see this used with all MCO's."*
- *"The physicians thought highly of the ODG program."*
- *"If I was able to pull up the ODG guidelines per patient on the web, that would be great."*
- *"We like the concept."*
- Provider Pole: *"Did you feel that ODG met the needs of your injured workers?"* Average score was 4.18 on scale of 1-5.

Ohio Recent Findings 2009 – Deloitte Study

- $7 million comprehensive Deloitte Consulting study of Ohio's workers' compensation system completed 04/2009
- Mandated by Ohio Assembly to measure the performance of Ohio WC & benchmark against other states
- One of Deloitte's major recommendations was to ***further strengthen Ohio's adoption of ODG***:
  - "Should ***require all MCOs to use ODG*** in UR"
  - "The bureau should be prescriptive and ***mandate the use of ODG***"
  - "***ODG is the emerging standard*** for UR decisions and expected disability duration"
  - "Specification of ODG for medical treatment is expected to yield a ***positive impact and needed consistency in managing providers***"
  - Recommends Ohio ***adopt ODG for RTW as well***

www.ohiobwc.com/deloitte

Legislation with a Positive Effect
Do Not Rush to Implement Misguided Legislation Without First Considering Other Cost Saving/Streamlining Suggestions

With well thought-out legislation, there can be significant savings for employers (without undue harm to disabled workers) through the following:

- Implementation of evidence based medicine which has been shown, in some studies, to result in significant medical and wage loss exposure: This is currently being implemented by the Michigan Workers Compensation Agency. Some changes to Sec. 315(4)-(9) could make this implementation smoother.

- Simplifying the *Sington/Stokes* disability definition and procedure: Specific statutory revisions could easily reduce the currently unnecessary administrative costs and delays if the definition of disability and the proof requirements were refined. Even the Supreme Court, when it wrote the *Stokes* decision, understood that there was a significant burden being placed on the Plaintiff. However, it felt that it had no choice because of the language of the statute. Unfortunately, the significant burden has actually affected both sides.

- Implementation of strong incentives on both the employer and the employee to keep the partially disabled employee at work can have a dramatic impact on costs: Unfortunately, the *Lofton/Harder* cases creates just the opposite: a disincentive for employers to continue accommodating the partially disabled worker. Correction of the *Lofton/Harder* anomaly and implementation of a strong duty on the disabled worker to look for work when he/she cannot be to look for accommodated by their employer would be a win/win situation. Another unintended consequence of *Lofton/Harder* will be that almost every case will carry with it the potential for litigation since the formula for determining the rate will be so subjective.

Adopting misguided legislation which goes too far will actually be counterproductive for the business community. Removing incentives for employers to work by drastically cutting wage loss benefits to admittedly disabled workers, reflecting what they theoretically could have been making, even though they cannot find a job will have unintended consequences. There are thousands of employees working in this state, at this time, who are partially disabled and who are being accommodated by their employers. With misguided legislation being implemented, many of these employees will find themselves without a job. There will be increased unemployment claims. There will be increased Medicaid claims. There will be increased general assistance claims. Perhaps more importantly, there will be not only a shift to the taxpayer for unemployment, Medicaid, and Welfare, but also to the employers themselves via increased group claims, short term disability claims, and long term disability claims.

Currently, the workers comp system is very favorable for employers. Premiums have been dropping. They will continue to drop. Implementation of some of the above suggestions will result in a further decrease in premiums. However, any additional savings, by way of reduced premiums because of the *Lofton/Harder* rule, will be far outweighed by the cost of the shift of burden and perhaps most importantly, the unfortunate narrative that may drown out all the other good news.

WC REVISIONS – Fotieo Draft #4
August 26, 2011

Fotieo Draft

The Changes from draft #2 and #3 are found in the following sections: 301(4), 315, 351, 357, 361 and 801

The changes in the fourth draft are commented on in the blue font commentary.

In deciding which sections to address I focused on the following:

- Sections involving *Sington* and *Lofton*
- Some of the sections addressed in the MSIA Proposed Revisions
- Some of the sections/issues listed by Atty Housefield in his summary of the committee members commentaries
- Any other ideas which could lead to a savings for business without undue harm to the disabled worker.
- I have not addressed anything else - I am sure much more could be done.

418.222(2) include language for both sides to disclose maybe within 60 days? To be addressed

418.301 Compensation for personal injury……
(1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

Commentary: Section 301(1). There is no compelling reason to eliminate Chapter 4. It is just cause for mischief and creates unintended opportunities for litigation. Whose got the time to go over our long litigation history concerning Chapter 4 injuries to determine what anomalies might be caused by such a maneuver? Leave it alone. If there truly is some compelling reason to transfer Chapter 4 injuries to Chapter 3 then I would recommend at a minimum recommend that the word "***also***" be inserted as follows:

Personal injury shall ALSO include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment. An ordinary disease of life to which the public is generally exposed outside of the employment is not compensable. A personal injury covered under this act shall be compensable if it causes, contributes to, or aggravates pathology in a manner that is medically distinguishable from the employee's prior condition.

(2) Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof.

Commentary: Section 301(2). My gosh, the mental cases are hard enough to prove. Let the weak among us have a shot at winning a case once in a while. Leave it alone.

(3) An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act. Any cause of action brought for such an injury is not subject to section 131.

301(4)
NOTE: HOW DO WE DEFINE "DISABILITY" SO THAT IT IS A FAIR STANDARD FOR ALL *AND* WHERE ALL PARTIES CAN AVOID THE EXPENSIVE COSTS OF VOCATIONAL ANALYSIS/TESTIMONY (WHICH, SINCE *STOKES*, IS NOW NECESSARILY REQUIRED). WHAT FOLLOWS ARE TWO ALTERNATIVE EFFORTS TO DELIVER THE BASIC *SINGTON* CONCEPT WITHOUT THE NEED FOR VOCATIONAL TESTIMONY. THERE MAY WELL BE OTHER GOOD WAYS TO ACCOMPLISH THIS. THE FIRST ALTERNATIVE FOCUSES MERELY ON THE EXERTIONAL REQUIREMENTS OF THE JOBS IN THE LAST 15 YEARS. THE SECOND ALTERNATIVE WAS SUGGESTED TO ME BY A RESPECTED DEFENSE ATTORNEY. THE SECOND ALTERNATIVE SEEMS TO BE WHAT THE PRACTICE WAS AFTER *SINGTON* FIRST CAME DOWN AND BEFORE *STOKES*. IT SEEMS TO BE PRETTY MUCH WHAT THE COURT OF APPEALS AND THE APPELLATE COMMISSION WERE SAYING BEFORE *STOKES* ADDED THE NECESSITY FOR MORE PROOFS. MY RECOLLECTION IS THAT BOTH THE PLAINTIFF AND DEFENSE BAR ACCEPTED THAT AS A FAIR METHOD. IN THIS

SECOND ALTERNATIVE THERE IS LANGUAGE WHICH ALLOWS A MAGISTRATE TO FIND THAT THE THERE ARE NO OTHER AVAILABLE JOBS IF HE FINDS THAT THE EMPLOYEE ENGAGED IN "GOOD FAITH JOB SEARCH EFFORTS" PLEASE REVIEW BOTH ALTERNATIVES TO SEE IF ANY TWEAKING IS NEEDED TO GET US TO FAIRNESS AND SIMPLICITY.

ALTERNATIVE 1:

(4)(*a*) As used in this chapter, "disability" means a limitation of an employee's ***ability to perform his or her job at the time of injury as well as any other job the employee held within the 15 years before the date of injury, if such other job paid as much or more.***

(b) An employee making a claim for benefits under this act, shall, upon request of the employer, disclose the names and addresses of his employers for the 15 years prior to the date of the injury and for each such employer shall give a description of the wages provided and level and duration of exertion required in the jobs performed during that period. The employee shall also, if requested by the employer, authorize past employers to provide the same information. All employers subject to this act shall, upon written request, promptly complete and return to both the requesting employer and the employee any agency approved forms designed to disclose this information. If requested by the employer, the employee shall authorize the Social Security Administration to release an itemized statement of earnings designed to identify the names and addresses of his employers for the 15 years prior to the injury.

(c) Pursuant to section 221, the Director of the Workers' Compensation Agency shall create one or more forms designed to facilitate the disclosure and release of information for the efficient administration of subsection 301(4). The director shall also create designed to facilitate an employer's section 301(5)(g) notice, and to facilitate the documentation by an employee of his job search efforts. The forms created by the agency shall contain a brief description of the relevant rights and obligations and possible legal consequences in the event of noncompliance.

Commentary re **above:** Subsection 301(4) delivers the basic Sington concept without the burden and cost of hiring vocational counselors. The 15 year rule, eliminates the ancient irrelevant minutia. Subsections (b) and (c) will help facilitate the prompt acquisition of information. Obviously the employer will not need this information in most cases, where the employee is likely to be going back to work within a reasonable period of time. If the forms created by the agency contain a brief section of rights and obligations, there is a greater likelihood of prompt compliance. Armed with formal agency job search forms, the employer may be able to get as much if not more of a real job search on the part of the employee as they might by having to hire a voc counselor. In this fourth draft I have:

- From (b) removed the phrase "to his best recollection".
- From (b) removed the last silly sentence which said the employer may defer the request to a later time.
- In (b) Added the phrase: "upon written request" and the word "requesting".
- From (c) removed the word "simple" from the phrase "simple forms" because it would unnecessarily tie the hands of the Director.

Those were all good suggestions. I continue to welcome suggestions.

ALTERNATIVE 2:

(4) As used in this chapter, "disability" means a limitation of an employee's ***ability to perfom his or her job at the time of injury as well as any other available jobs that pay as much or more than the job he was performing at the time of injury. Good faith job search efforts may be determined by the magistrate as evidence that no such jobs are available.***

Commentary re Alternative 2: With this definition we would not need to include subsections (2) and (3). Obviously the employer could send the employee all sorts of job leads which would impact the judge's assessment of the "good faith". This alternative section seems to not require vocational testimony. The phrase "wage earning capacity", which is what gives life to Stokes, has been removed and thus it could be argued that Stokes is no longer operative. But this legislation is not being proposed in a vacuum. Therefore, does this need to be tweaked? If this alternative if found preferable, then we should move the following sentence into proposed section 310(5(f):

> ***Pursuant to section 221, the Director of the Workers' Compensation Agency shall create one or more forms designed to facilitate an employer's section 301(5)(f) notice, and to facilitate the documentation by an employee of his job search efforts. The forms created by the agency shall contain a brief description of the relevant rights and obligations and possible legal consequences in the event of noncompliance.***

Commentary re **below**: The changes in subsections 301(5)(b) thru (d) do not change the way the system has operated. The change in (e) removes the language "for whatever reason" which many employers did not like, and replaces it with "except for intentional and willful misconduct" consistent with what some employers felt the employee should not be able to get away with. My own view is that this was more of a perceived problem than a real one. Subsections (f) and (g) are designed to give the employee a strong incentive to look for work in good faith and give the employer leverage to encourage such activity. No rest for the

wicked. In subsection (9) concerning "reasonable employment", the word capacity is being replaced with the word "ability". Ever since the Court gave a new meaning to the word "capacity" one never knows what might grow out of it elsewhere.

(5) If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:

(a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.

(b) If an employee is employed and the ~~average~~ weekly wage of the employee is less than ***the average weekly wage*** ~~that which~~ the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax ***average*** weekly wage before the date of injury and the after-tax weekly wage which the injured employee ***actually earns*** ~~is able to earn~~ after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

(c) If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for ***those weeks.*** ~~the duration of such employment~~.

(d) If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:

(i) If after exhaustion of unemployment benefit eligibility of an employee, a worker's compensation magistrate or hearing referee, as applicable, determines for any employee covered under this subdivision, that the employments since the time of injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a ***rebuttable*** presumption of wage earning capacity established for employments ***totaling*** ~~totalling~~ 250 weeks or more.

(ii) The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she shall be entitled to wage loss benefits based on the difference between the

normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury.

(iii) If the employee becomes reemployed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).

(e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job ***except for intentional and willful misconduct*** ~~for whatever reason~~, the employee shall receive compensation based upon his or her wage at the original date of injury.

(f) If the employer in good faith notifies the employee in writing that it does not have, or no longer has reasonable employment available for the employee, the employee shall make a good faith effort to seek and obtain reasonable employment elsewhere as follows:

(i) The employee's duty shall be ongoing.

(ii) The employment search shall not be limited to employments paying equal to or more than the employee's past maximum wages.

(iii) A prospective job may not be rejected because the pay is less than the employee's past maximum wages.

(g) At anytime after 26 weeks have elapsed since employee was given written notice by the employer as set forth in (f) above, the employer may file an application for hearing to request that the employee's weekly wage loss, which would otherwise be payable, be reduced as set forth in this subsection. The burden of proof for such a reduction shall be on the employer. If the employee is found to have, without reasonable cause, not engaged in a good faith effort to find reasonable employment as set forth in (f) above, the weekly wage loss, otherwise payable for such duration, shall be reduced by 25%. If the magistrate finds that the employee is still not reasonably engaged in a good faith effort as of the time of the hearing the magistrate shall order that the 25% reduction continue until further order. At anytime after 26 weeks from the date of the entry of such an order by a magistrate, the employee may file an application for hearing to have the 25% reduction removed. For purposes of such an application the employee shall have the burden of proving that he is reasonably engaged in a good faith effort. Upon finding that the employee is reasonably engaged in a good faith effort, the magistrate shall enter an order removing the 25% reduction commencing not earlier than 26 weeks since the magistrate's

order reducing the benefit. No reductions or increases shall be made under this subsection for any periods prior to one year before the application for hearing.

(6) A carrier shall notify the ***Unemployment Insurance Agency*** ~~Michigan employment security commission~~ of the name of any injured employee who is unemployed and to which the carrier is paying benefits under this act.

(7) The ***Unemployment Insurance Agency*** ~~Michigan employment security commission~~ shall give priority to finding employment for those persons whose names are supplied to the commission under subsection (6).

(8) The ***Unemployment Insurance Agency*** ~~Michigan employment security commission~~ shall notify the ***Workers' Compensation Agency*** ~~bureau~~ in writing of the name of any employee who refuses any bona fide offer of reasonable employment. Upon notification to the ***Workers' Compensation Agency*** ~~bureau~~, the ***Workers' Compensation Agency*** ~~bureau~~ shall notify the carrier who shall terminate the benefits of the employee pursuant to subsection (5)(a).

(9) "Reasonable employment", as used in this section, means work that is within the employee's ***ability*** ~~capacity~~ to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence. The employee's ***ability*** ~~capacity~~ to perform shall not be limited to jobs in work suitable to his or her qualifications and training.

(10) Weekly benefits shall not be payable during the period of confinement to a person who is incarcerated in a penal institution for violation of the criminal laws of this state or who is confined in a mental institution pending trial for a violation of the criminal laws of this state, if the violation or reason for the confinement occurred while at work and is directly related to the claim.

(11) A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a compliant or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

(12) This section shall apply to personal injuries and work related diseases occurring on or after June 30, 1985. ***QUERY: Can this subsection be used somehow to make these changes retroactive for all cases after 6/30/85 For example: This chapter shall apply to ;;;;; Note the use of the word "chapter" to bring in section 361.***

418.315 Furnishing medical care for the injury.....

I have three comments here:

- "Exclusive control" of medical should not be the law. Besides, Evidence Based Medicine alone, will probably bring even more savings into the system (a system that is one of the least expensive medical systems I the country due to Michigan's Health Care Service Rules, according to the Workers Compensation Research Institute's (WCRI) last three studies)..
- There appears to be some concern in the insurance industry re attorney fees for medical expenses. I think that at a minimum attorney fees should be discretionary by the magistrate where the magistrate finds that the predominant reason for the application for hearing was the medical expenses.
- I think that provisions (4) through (9) need to be tweaked to flow better and to make sure that the involved provider (eg surgeon) and ancillary providers (**such as the radiologist, anesthesiologist or hospital) do not have recourse against the employee or that the employer still remains liable for that exposure ancillary exposure. But, I do not want to suggest any changes here, until Director Elsenheimer has finished preparing his rules for implementing EBM. Under the act, as it reads now, those rules are his prerogative. There is no point in redrafting these provisions only to find out that they do not fit the scheme. Most of my concerns re these subsections are that they do not flow well and therefore may cause some due process issues.**

418.321; 418.331 418.341 There appears to be strong support on the committee for rewriting the death benefit sections. I do not have time to address this. Hopefully those interested will be doing so. Also should address definition of "proximate cause" Paige v City of Sterling Heights

Commentary re below: Section 351(1) and Section 361(1) have been modified to replace the word "incapacity" with the word "loss" to make it more clear and consistent with how we have always understood these sections. The difference between total and partial disability or between total and partial incapacity has always been understood to depend on whether or not the disabled employee has returned to favored work. The first sentence added to section 361(2) allows for an analysis of the loss of industrial use cases in a more fair way for the employer by taking into account some of the feats of modern medicine. Trammel

418.351 Total ~~incapacity for work~~ *wage loss* amount and duration of compensation; limitation on conclusive presumption of total and permanent disability; determining question of permanent and total disability.

(1) While the ~~incapacity for work~~ ***wage loss*** resulting from a personal injury is total, the employer shall pay, or cause to be paid as provided in this section, to the injured employee, a weekly compensation of 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. The conclusive presumption of total and permanent disability shall not extend beyond 800 weeks from the date of injury and thereafter the question of permanent and total disability shall be determined in accordance with the fact, as the fact may be at that time.
In this fourth draft I have replaced the word "work" with the word "wage". Thank you for this suggestion. I made the same change in 361.

418.354 Coordination of Benefits

(d) The after-tax amount of the pension or retirement payments received or being received ***by the employee, or which the employee is eligible to receive at the normal or full retirement age,*** pursuant to a plan.....
(e) *insert same language as above*

418.357 Employee 65 or older; reduction of weekly payments; exception
(3) Sections 354(1) and 357(1) shall not apply to injuries, which occur after 12/31/11, where at the time of the injury the employee was already receiving social security retirement benefits.
Commentary: Section 357. Everyone (including the Court which invited statutory change) agrees that the senior citizens who are on social security retirement benefits when they get hurt are treated very unfairly under the current scheme.

418.360 Professional athlete .....
I do not think this needs to be addressed

418.361 Partial ~~incapacity for work~~ *wage loss*; amount and duration of compensation; effect of imprisonment or commission of crime; scheduled disabilities; meaning of total and permanent disability; limitations; payment for loss of second member.

(1) While the ~~incapacity for~~ ***wage loss*** resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax ~~average~~ weekly wage which the injured employee ***actually earns*** ~~is able to earn~~ after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for

the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.
In this fourth draft, I not only changed "work loss" to "wage loss", but also struck out the word ~~average.~~

(2) ***For each loss under this subsection, the effect of any joint replacement surgery, implant, or other medical procedure shall be considered in determining the usefulness of the body part***. In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid fro the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:

(a – l) not typed here.

418.371 Weekly loss in wages; average weekly wage.

~~(1) The weekly loss in wages referred to in this act shall consist of the percentage of the average weekly earnings of the injured employee computed according to this section as fairly represents the proportionate extent of the impairment of the employee's earning capacity in the employments covered by this act in which the employee was working at the time of the personal injury. The weekly loss in wages shall be fixed as of the time of the personal injury, and determined considering the nature and extent of the personal injury. The compensation payable, when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not exceed the employee's average weekly earnings at the time of the injury.~~

Commentary: Section 371(1) has been eliminated. I have never been able to understand what this section meant and whether it added anything. Maybe it was late at night when it was originally drafted. I understand that the last sentence was probably put there to prevent a person who was was disabled from skilled work to receive full benefits and still earn wages at unskilled work. Of course that was back when the Court understood the concept of wage earning capacity. It is better to eliminate the entire section lest more confusion occurs. This subsection does not really add anything to the current scheme.

418.801 Payment of compensation; time; manner; record; reports; daily charges as elements of loss; failure to notify carrier of disability or death; interest.

(6) When weekly compensation is paid pursuant to an award of a worker's compensation magistrate, an arbitrator, the board, the appellate commission, or a court, interest on compensation shall be ~~paid at the rate of 10% per annum~~

~~from the date each payment was due, until paid~~. ***calculated at 6 – month intervals from the date of filing the application for hearing at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5 – year United States Treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer.***

Commentary: The reason section 801(6) provided for 10% was to discourage the employers from appealing even those cases they did not expect to win, which they used to do when the interest rates were higher and the appeal times were longer. Hopefully we could reach a compromise to provide more than the interest in the above MSIA suggested provision, so that we do not return to the times of olde, where often cases were appealed just to starve out the employee.

MICHIGAN'S WORKERS COMP COSTS COMPARE FAVORABLY TO THOSE OF OTHER STATES

• The Workers' Compensation Research Institute's[1] 16-state study analyzing workers' compensation costs between 2003 and 2008 shows that the overall growth rate of Michigan's per-claim cost was ***the lowest*** among the States that did not enact major reforms of their compensation acts during those years.[2]

• The average $4,900 total cost per claim was ***36% lower*** than the median cost in the States studied.

• In cases involving more than 7 days of lost time:

  • Michigan's average per-case medical cost of under $9,200 was ***one of the lowest*** of the States studied.

  • Michigan's average per-case indemnity cost was ***7% lower*** than the median of the States studied.

• Michigan's prescription drug costs were ***the lowest*** of the 16 States studied.

• Michigan's average weekly benefit rate is ***lower*** than the average of the States studied.

• Michigan's maximum weekly benefit is ***lower*** than the maximum weekly benefit available under the laws of most States.

• In January, 2012 Michigan's raw workers' compensation premium will decline by 7.4%, according to Steven Hilfinger, the director of the Department of Licensing and Regulatory Affairs. This reduction will follow a premium decrease of 1.9% in January of 2011 and a premium decrease of 3.1% in January of 2010.

Stats

[1] The Workers Compensation Research Institute is an independent non-profit research organization that furnishes objective information about workers' compensation public policy issues. It takes no position on these issues.
[2] The States studied in addition to Michigan were California, Texas, Tennessee, Florida, Minnesota, Maryland, Louisiana, Indiana, New Jersey, Massachusetts, Illinois, Iowa, Pennsylvania, North Carolina and Wisconsin. During the years studied, California, Texas, Tennessee, Florida and Illinois reformed their workers' compensation acts.

The Michigan Workers' Compensation Emergency

August, 2011

Almost everyone has an opinion about Michigan's Worker's Disability Compensation Act. Some say it needs no changes. Others say it should be completely overhauled because employers' costs are spiraling out of control. But what are the facts?

Just five months ago, the Insurance Institute of Michigan's executive director, Pete Kuhnmuench, told the House Insurance Committee that ***Michigan's per-claim cost is actually 35% lower*** than the median cost of workers' compensation claims in other States. And in both 2008 and 2010, the State of Oregon's Worker's Compensation Premium Rate Ranking Summary described Michigan's premiums as relatively low and said that Michigan's weekly benefit rates are comparable to those of other States. So it's inaccurate to say that Michigan's workers' compensation costs are too high.

But things are not as they should be. While the Act is presently cost-friendly to Michigan's employers, ***an emergency exists because both employee and employers' costs are being needlessly increased.*** We must help business to remain competitive by lowering costs while continuing to protect injured workers and their families from the economic challenges that wage loss causes.

What is responsible for these higher administrative costs? The Supreme Court has issued decisions that increase costs and unreasonably restrict disabled workers' access to the weekly benefits they need in order to survive. Two of these decisions are called *Sington* and *Stokes*.

In *Sington*, the Court rejected the decades-old rule that said "disability" existed if an injury prevented the employee from performing the job in which he or she was injured. This rule worked well because it required a simple answer to one question—can the injured worker return to the job he or she was performing when the injury occurred? Under this rule, administrative costs for employers and employees alike were minimal.

But under *Sington* and *Stokes*, costs have soared. *Sington* replaces the prior easily-administered rule with an ambiguous and more subjective rule that says "disability" is a reduced wage-earning capacity in work suitable to the employee's qualifications and training. And *Stokes* says that to establish "disability," an injured worker must prove ***all*** of the following:

- The employee must disclose his or her qualifications and training.
    - Under this requirement, most workers are being asked for a complete educational and work history from age 18 onward.

Sington/Stokes

- To be certain that the worker has disclosed every job held over his or her working career, the employee often must spend up to $100 to obtain a Social Security Administration earnings summary.

- The worker must identify the jobs that he or she is qualified and trained to perform and that pay at least as much as the worker's highest –pre-injury job.

  - Under this requirement, both sides hire vocational experts to interview the worker and to assess his or her work history and educational background.

  - The vocational expert is also paid to perform a transferable skills analysis to identify the jobs, if any, in the regional economy for which the employee is qualified and trained, and to assess whether the employee has all additional skills that may be necessary to perform the hypothetical positions.

  - The expert must also conduct a labor market survey to determine the wages that these positions pay.

- The employee must prove that his or her injury prevents him or her from performing any job that is within the employee's qualifications and training.

  - This usually requires a determination of each job's duties and of its specific exertional and non-exertional requirements.

  - An additional determination is required as to whether the employee's medical restrictions preclude the worker from performing each of these jobs.

- The worker must show the inability to obtain any job that he or she can perform which pays as much as the worker earned before being injured.

  - Most workers are being asked to keep detailed logs of the particulars of each job search.

  - Even those employees who expect a rapid return to work at their current employers are being asked whether they have been unable to find employment elsewhere.

Stington and *Stokes* thus replaced a fair and workable one-question inquiry—"can the injured worker do the job in which he or she was injured?"—with a four-question inquiry. As anticipated, this multi-level inquiry has added between $2,000 and $4,000 in costs to every litigated workers' compensation case. These costs represent the fees paid to vocational experts who testify as to the jobs that are within an injured employee's qualifications and training, the wages that these jobs pay, and the availability of the jobs.

These increased costs serve neither side because the *Sington/Stokes* inquiry generally results in a finding of disability that would have been reached under the original and simple rule. This is the usual case because most injured employees are injured while working at their highest-paying job, and if the employee cannot perform that job, he or she usually satisfies the laborious and costly *Sington/Stokes* inquiry.

And which side pays for the vocational experts' testimony? Naturally, the employee must pay for a vocational expert to testify on his or her behalf to show "disability." But the employer must also pay for a separate vocational expert to testify if it wishes to demonstrate the absence of "disability." The net result is that under *Sington* and *Stokes*, ***both sides pay thousands of dollars just to present a "battle of the experts."***

The vocational experts are the sole beneficiaries of this "battle" because they are paid to testify. ***But both the employer and the employee lose***—the employer's costs are more than necessary, and the worker's benefits are less than they would otherwise be.

Other recent Supreme Court decisions further increase administrative workers' compensation costs. In cases called *Lofton* and *Harder*, the Court says that a disabled worker's weekly benefit rate is subject to reduction based on what the worker remains capable of earning after he or she is injured—even if the employee never works again. Once again, expert vocational testimony is required. And like the *Sington* and *Stokes* rules, the *Lofton/Harder* rule unnecessarily ***increases costs that both sides must pay***. And ***both the employer and the employee lose*** because the experts who are paid to testify are the only people who benefit from the rule.

Whenever a longstanding and tried-and-true rule is judicially replaced with a complicated and uncertain one, confusion inevitably reigns. This is what has occurred in Michigan's workers' compensation law. The needlessly complex *Sington/Stokes* inquiry and the ill-advised *Lofton/Harder* rule have introduced uncertainty into the law by introducing concepts—the "universe of jobs" and "temporary disability" are just two examples—that have *never* been a part of Michigan's Act.

These ***cost-boosting concepts harm both sides*** in a variety of situations:

- These new concepts are ill-suited for an effective workers' compensation system. Employers and employees need to be able to assess the facts and to be able to make prompt determinations so that proper accommodations and payments are not delayed.

- These concepts cause needless additional expense and delays for employers and employees because more time is required to properly prepare cases for trial.

- Multiple adjournments are often necessary so that both sides can complete the necessary vocational rehabilitation assessments, depositions of expert witnesses, and job searches. These adjournments cost employers money.

• The Court's pronouncement of ever-changing rules as to what each side must prove has transformed a workers' compensation trial into an exercise in "hitting a moving target." Predictably, the "target" moves after the case has been tried, which requires additional proceedings at additional expense to employers.

• The appellate process is more frequently involved because the meaning of poorly-defined concepts must be litigated to learn whether these concepts apply in a given case. Appellate litigation substantially increases employers' legal expenses.

• More delay results when a remand is required, with additional legal costs to employers.

Michigan is in a national competition to attract and retain employers. But Michigan cannot win this competition if employers must now start paying more than necessary to meet their workers' compensation obligations. It is unlikely that prospective future employers will find this new system attractive if even they can not understand it. And Michigan will be unable to attract and retain workers if they are asked to accept less than they should if a work-related injury prevents them from earning wages and paying taxes.

The question we now face is, "How can we undo the harm, presumably unintended, that the Supreme Court has caused?"

Some might say that further ongoing litigation to define or refine these ill-suited concepts must be endured until the litigation ends, years later, with judicial clarification of these concepts. But this is like saying that the way to end a flood is to add water. The better answer—one that can be implemented much sooner—is to carefully draft language for addition to Michigan's Worker's Disability Compensation Act that will solve the current difficulties.

What problems might such language address? In addition to eliminating the *Sington/Stokes* conundrum, the new language would:

• Require employees, claims examiners and their supervisors to attend pre-trial proceedings in order to expedite facilitations and seek settlements because settlement is always cheaper than litigation. If a case must be tried, they should be required to attend all proceedings so that a settlement could be reached at any time.

• Reduce employers' costs by requiring attorneys to identify the issues to be tried. Costly discovery procedures should be replaced with a simple requirement for each side to exchange information.

• Permit attorneys to sign and issue subpoenas without the need to obtain a magistrate's signature, as is permitted in the courts of general jurisdiction.

Magistrates would be able to devote more time to helping parties settle cases and to trying those cases that cannot be settled.

• Prohibit the use of EBM (evidence-based medicine) because it needlessly increases employers' costs. These costs are incurred when experts testify concerning an injured employee's medical care in relation to the medical care given to others.

• Allow a revival of the "small claims" division within the Worker's Compensation Agency, so that employees who seek benefits for a short time period, or who seek minor medical benefits, will no longer "fall through the cracks" of the present system.

Currently, many truly disabled employees are being denied workers' compensation benefits. Some may believe that action is unnecessary. But the farsighted will realize that ***these employees will ultimately qualify for Medicaid—a general fund program***. Disabled employees on Medicaid can receive many expensive taxpayer-financed medical services such as hospital and nursing home care; home health care; prescription medications; rehabilitation services; mental health care and physical therapy. They can also receive other State taxpayer-financed benefits to pay for food; for home repairs; and for heat and utilities. If foreclosed upon, disabled employees can receive taxpayer-financed relocation assistance.

A cost shift of this magnitude to the State's general fund, should it occur, would pose an imminent and significant danger that would doom Michigan's economic recovery. Therefore, we must take ***prompt corrective action now***.

The proper operation of Michigan's workers' compensation system is critically important to all of Michigan's employers, workers, taxpayers and policymakers. To meet the present emergency, we must draft appropriate language for inclusion in the Worker's Disability Compensation Act. By doing so, we can ensure that our system keeps its rightful place as one of the Nation's most cost-efficient and effective workers' compensation systems.

Michigan's future awaits us. We must not fail.

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Proofs

SINGTON/STOKES PROOFS

The following items can be expected to be found in every workers' compensation case which gets litigated, if it is to be in compliance with *Sington/Stokes*. Before the *Sington* case, when the definition of disability was understood to be whether or not the employee is capable of engaging in his regular job, none of the following items were needed. The focus of the case was on the medical testimony, the restrictions, a description of the job coming from each of the parties along with any other testimony needed for other issues that might have been involved.

The following items are being presented just so that you can see the shear volume of activity needed to comply with the cumbersome and unwieldy *Sington/Stokes* issues. Keep in mind that almost universally the outcome of the case is not much different than it would have been with the original definition. This is because typically most people are at their maximum wage earning capacity when they get hurt. Most people are not looking for easier work. Most people are not looking for cheaper work. Thus, in most cases all of the following becomes busy work that is irrelevant to the typical outcome of the case. If the *Sington/Stokes* issue really mattered, insurance companies would be ordering this up early on in every case. They do not. It is typically only done by each party when and if they absolutely have to at the last minute after they realize the case is definitely going to trial. Only then do they have to deal with these technical requirements for proof of disability.

SOCIAL SECURITY EARNINGS INFORMATION

The attached print-out comes from the Social Security Administration and lists all of a worker's employers along with the earnings made with each employer for each quarter. Since the plaintiff has the burden of proving what his/her maximum earning capacity was before the injury and since many workers genuinely cannot remember the names and earnings for each of their past employers, most plaintiff attorneys will order up this summary.

The charge from SSA for this particular summary was $72.50. The amount varies depending on how many years of information are requested.

It is dangerous to try a case without this information. While on the witness stand, if the claimant suddenly remembers an employer whom he had previously forgotten, then the hypothetical proofs upon which the vocational expert rendered his/her opinion would be incomplete and inadmissible. The plaintiff would then fail in his burden of proof.

A further complication arises when, unfortunately, some workers do not even recognize one or more of the listed employers. This is because sometimes the earnings are reported under a parent company with different names and addresses.

WORK HISTORY QUESTIONNAIRE
FORM 105A

After the Supreme Court decided the *Sington/Stokes* cases, practitioners were left guessing as to the level and nature proofs required to meet this major change of the definition of "disability". Therefore the Director of the Michigan Workers' Compensation Agency prepared this Form 105A in an attempt to assist the parties in disclosing the necessary information to comply with *Sington/Stokes*.

The claimant who completed the attached Form 105A did an exceptional job with lots of details. However, too often claimants cannot remember the answers to all of these questions.

PLAINTIFF'S VOCATIONAL COUNSELOR'S REPORT

Attached is a report prepared by a vocational counselor at the request of the attorney for the plaintiff.

- Typically the counselor will review material with background information such as the Form 105A, medical reports and records with restrictions, personnel file information, job descriptions and the like before they meet the claimant for a detailed interview.
- Then the vocational counselor analyzes each job as well as the educational/training history to determine what skills the worker may have.
- Thereafter the counselor does vocational research often using the Dictionary of Occupational Titles. The counselor will have to identify each job within the dictionary (sometimes not an easy task).
- Next the vocational counselor will have to determine what skills are typically associated with those jobs and determine whether or not the employee likely acquired those skills in that actual position.
- Then the counselor has to determine to which other jobs in the Dictionary of Occupational Titles those skills might transfer as well as determining whether there are any other skills that are needed for each of those projected positions.
- Then, the counselor must determine what the jobs currently pay which will require making many phone calls for a "labor market survey". Sometimes counselors will rely upon industry averages (which can be problematic under some circumstances).
- Finally, the counselor has to determine whether any of those positions identified are available at a wage higher than what the worker was making at the time of injury in order to determine the maximum wage earning capacity before the date of injury.

After all of the above proofs, then the workers' compensation magistrate has to determine whether the medical restrictions preclude

the claimant in engaging in the work activity at this historical maximum.

The charges for these services can vary widely depending on how complicated the facts are, the capabilities of the counselor, the detail to which the counselor chooses to employ and the time to draft the report. These reports can cost anywhere from a few hundred dollars to figures in excess of $1,000. Attached you will also find a bill from a vocational counselor which totaled to $1,357.20 for this phase. This did not even include the later charges for the deposition. As you can imagine these expenses are a prohibitive cost in cases where the claimant recovers enough to be able to return back to work in a few months. With scenarios like that the plaintiff's attorney tries to hold off getting the expensive proofs with the hope of trying to resolve the matter by agreement. This results in many of the delays that both the employee and employer complain about. Both the employer and the employee get frustrated with the system, not knowing why the many delays.

DEFENDANT'S VOCATIONAL COUNSELOR'S REPORT

Of course, the defendant's vocational counselor has to address all of the same issues that the plaintiff's vocational counselor does. Since the typical defense attorney does not pay for the counselor's invoice and instead merely forwards it on to the carrier, there is less stated pressure to the counselor to try to keep the activity/charges to a minimum. Understandably plaintiff's attorneys are often looking to keep costs low so that large case costs do not make settlement more difficult to accomplish. For all these reasons my guess is that the defendant's vocational counselor's bills probably are greater than what plaintiff's attorneys are used to seeing. Some vocational counselors may feel they have more license to engage in more activity (churning?).

The qualifications of a vocational counselor (whether plaintiff or defense) can vary widely. The gold standard is a CRC (certified rehab counselor). However, many individuals are hired by vocational rehab outfits with no more qualifications other than a BA degree. As you can imagine the quality of the work product and testimony can thus, vary widely.

DEPOSITION OF PLAINTIFF'S VOCATIONAL COUNSELOR

This is what a typical deposition of a vocational counselor looks like for purposes of satisfying the *Sington/Stokes* issues.

With the recent emergence of the *Lofton/Harder* Supreme Court Orders we can now expect that not only both reports and both depositions of the vocational counselors will become even lengthier. This is because now they will not only have to identify what the injured worker's maximum wage earning capacity was before the injury (so that we can determine whether or not the employee is "disabled"), but, also what their "retained" wage earning capacity is after the onset of the disabilities, so that we can subtract that not from the maximum but from the 80% of after tax of the wages that were actually being earned. Not only is this unfair but it adds another time consuming ambiguous factual issue which needs to be resolved.

DEPOSITON OF DEFENDANT'S VOCATIONAL COUNSELOR

TRIAL TRANSCRIPT

I have NOT attached typical trial transcript testimony. The reason I did not is because it is difficult to pull out of a trial transcript just those pages that deal with the *Sington/Stokes* issues. Typically the transcript from the workers' compensation trial will be two or three times as thick as the deposition transcripts. This is because there typically are several witnesses testifying at a hearing. Each of the witnesses may touch on the *Sington/Stokes* issues throughout their direct and cross examination. For these reasons I did not bother to attach the trial transcript pages. However, I believe it is reasonable to conclude that your typical hearing is extended by about 30% just to deal with the *Sington/Stokes* issues. *Lofton* will of course now add the need for additional lay proofs.

MAGISTRATE'S DECISION

In his decision a magistrate is required to recount the relevant facts, analyze the evidence and explain his/her decision making process. I have attached a sample the magistrate's analysis of the *Sington/Stokes* issues. There were additional pages earlier in this opinion where the magistrate recited the relevant evidence/facts on the *Sington/Stokes* issues. However, because many magistrates reference that information by witness rather than by subject matter, it was difficult to isolate those pages.

HB 5002

HOUSE BILL No. 5002

HOUSE BILL No. 5002

September 22, 2011, Introduced by Reps. Jacobsen, Bumstead, Jenkins, Damrow, Price, Lund, Agema, Pscholka, Lori, Olson, Shaughnessy, LaFontaine, Muxlow, MacGregor, Rendon and Zorn and referred to the Committee on Commerce.

A bill to amend 1969 PA 317, entitled

"Worker's disability compensation act of 1969,"

by amending sections 301, 315, 331, 353, 354, 360, 361, and 801 (MCL 418.301, 418.315, 418.331, 418.353, 418.354, 418.360, 418.361, and 418.801), sections 301 and 354 as amended by 1987 PA 28, section 315 as amended by 2009 PA 226, sections 331 and 801 as amended by 1994 PA 271, and section 361 as amended by 1985 PA 103, and by adding section 306; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 301. (1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. **PERSONAL INJURY INCLUDES A DISEASE OR DISABILITY THAT IS DUE TO CAUSES AND CONDITIONS THAT ARE CHARACTERISTIC OF AND PECULIAR TO THE BUSINESS OF THE EMPLOYER AND**

HOUSE BILL No. 5002

THAT ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT. A PERSONAL INJURY COVERED UNDER THIS ACT IS COMPENSABLE IF IT CAUSES, CONTRIBUTES TO, OR AGGRAVATES PATHOLOGY IN A MANNER THAT IS MEDICALLY DISTINGUISHABLE FROM THE EMPLOYEE'S PRIOR CONDITION. AN ORDINARY DISEASE OF LIFE TO WHICH THE PUBLIC IS GENERALLY EXPOSED OUTSIDE OF THE EMPLOYMENT IS NOT COMPENSABLE. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event ~~shall be~~ IS the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

(2) Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions ~~,~~ ~~shall be~~ AND DEGENERATIVE ARTHRITIS, ARE compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities ~~shall be~~ ARE compensable ~~when~~ IF arising out of actual events of employment, not unfounded perceptions thereof, AND IF THE EMPLOYEE'S PERCEPTION OF THE ACTUAL EVENTS IS REASONABLY GROUNDED IN FACT OR REALITY. MENTAL DISABILITY NOT CAUSED BY PHYSICAL TRAUMA IS COMPENSABLE ONLY IF IT RESULTS FROM GREATER MENTAL STRESS AND TENSION THAN THE DAY-TO-DAY MENTAL STRESS AND TENSION THAT ALL EMPLOYEES EXPERIENCE IN SIMILAR EMPLOYMENT. A HERNIA IS COMPENSABLE ONLY IF IT IS OF RECENT ORIGIN, RESULTS FROM A STRAIN ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT, AND IS PROMPTLY REPORTED TO THE EMPLOYER.

(3) An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act. Any cause of action brought for such an injury is not subject to section 131.

(4) As used in this ~~chapter "disability"~~ **ACT:**

(A) "DISABILITY" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease. **A LIMITATION OF WAGE EARNING CAPACITY OCCURS ONLY IF A PERSONAL INJURY COVERED UNDER THIS ACT RESULTS IN THE EMPLOYEE'S BEING UNABLE TO PERFORM ALL JOBS PAYING THE HISTORICAL MAXIMUM WAGES IN WORK SUITABLE TO THAT EMPLOYEE'S QUALIFICATIONS AND TRAINING, INCLUDING WORK THAT MAY BE PERFORMED USING THE EMPLOYEE'S TRANSFERABLE WORK SKILLS. A DISABILITY IS TOTAL IF THE EMPLOYEE IS UNABLE TO EARN IN ANY JOB SUITABLE TO THE EMPLOYEE'S QUALIFICATIONS AND TRAINING. A DISABILITY IS PARTIAL IF THE EMPLOYEE RETAINS A WAGE EARNING CAPACITY AT A PAY LEVEL LESS THAN HIS OR HER HISTORICAL MAXIMUM WAGES IN WORK SUITABLE TO HIS OR HER QUALIFICATIONS AND TRAINING.** The establishment of disability does not create a presumption of wage loss.

(B) "WAGE EARNING CAPACITY" MEANS THE WAGES THE EMPLOYEE EARNS OR IS CAPABLE OF EARNING, WHETHER OR NOT ACTUALLY EARNED.

(C) "WAGE LOSS" MEANS THE AMOUNT OF WAGES LOST DUE TO A

DISABILITY. WAGE LOSS MAY BE ESTABLISHED, AMONG OTHER METHODS, BY DEMONSTRATING THE EMPLOYEE'S REASONABLE, GOOD-FAITH EFFORT TO PROCURE WORK SUITABLE TO HIS OR HER WAGE EARNING CAPACITY.

(5) IF A PERSONAL INJURY ARISING OUT OF THE COURSE OF EMPLOYMENT CAUSES TOTAL DISABILITY AND WAGE LOSS AND THE EMPLOYEE IS ENTITLED TO WAGE LOSS BENEFITS, THE EMPLOYER SHALL PAY OR CAUSE TO BE PAID TO THE INJURED EMPLOYEE AS PROVIDED IN THIS SECTION WEEKLY COMPENSATION EQUAL TO 80% OF THE EMPLOYEE'S AFTER-TAX AVERAGE WEEKLY WAGE, BUT NOT MORE THAN THE MAXIMUM WEEKLY RATE DETERMINED UNDER SECTION 355. COMPENSATION SHALL BE PAID FOR THE DURATION OF THE DISABILITY.

(6) IF A PERSONAL INJURY ARISING OUT OF THE COURSE OF EMPLOYMENT CAUSES PARTIAL DISABILITY AND WAGE LOSS AND THE EMPLOYEE IS ENTITLED TO WAGE LOSS BENEFITS, THE EMPLOYER SHALL PAY OR CAUSE TO BE PAID TO THE INJURED EMPLOYEE AS PROVIDED IN THIS SECTION WEEKLY COMPENSATION EQUAL TO 80% OF THE DIFFERENCE BETWEEN THE INJURED EMPLOYEE'S AFTER-TAX AVERAGE WEEKLY WAGE BEFORE THE PERSONAL INJURY AND THE EMPLOYEE'S WAGE EARNING CAPACITY AFTER THE PERSONAL INJURY, BUT NOT MORE THAN THE MAXIMUM WEEKLY RATE DETERMINED UNDER SECTION 355. COMPENSATION SHALL BE PAID FOR THE DURATION OF THE DISABILITY.

(7) ~~(5)~~ If disability ~~is~~ AND WAGE LOSS ARE established, ~~pursuant to subsection (4),~~ entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:

(a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through

the Michigan ~~employment security commission~~ **UNEMPLOYMENT INSURANCE AGENCY** and the employee refuses that employment without good and reasonable cause, **OR IF THE EMPLOYEE IS TERMINATED FROM REASONABLE EMPLOYMENT FOR FAULT OF THE EMPLOYEE**, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of ~~such~~ refusal.

(b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage ~~which~~ **THAT** the injured employee ~~is able to earn~~ **EARNS** after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

(c) If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of ~~such~~ **THAT** employment.

(d) If the employee, after having been employed pursuant to this subsection ~~for 100 weeks or more~~ loses his or her job through no fault of the employee **AND THE EMPLOYEE IS STILL DISABLED**, the employee shall receive compensation under this act ~~pursuant to the following:~~**AS FOLLOWS:**

(*i*) ~~If after exhaustion of unemployment benefit eligibility of an employee, a worker's compensation magistrate or hearing referee,~~

~~as applicable, determines for any employee covered under this subdivision, that the employments since the time of injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a presumption of wage earning capacity established for employments totalling 250 weeks or more.~~IF THE EMPLOYEE WAS EMPLOYED FOR LESS THAN 100 WEEKS, THE EMPLOYEE SHALL RECEIVE COMPENSATION BASED UPON HIS OR HER WAGE AT THE TIME OF THE ORIGINAL INJURY.

(*ii*) ~~The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she shall be entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury.~~IF THE EMPLOYEE WAS EMPLOYED FOR 100 WEEKS OR MORE BUT LESS THAN 250 WEEKS, THEN AFTER EXHAUSTING UNEMPLOYMENT BENEFIT ELIGIBILITY, A WORKER'S COMPENSATION MAGISTRATE MAY DETERMINE THAT THE EMPLOYMENT SINCE THE TIME OF THE INJURY HAS NOT ESTABLISHED A NEW WAGE EARNING CAPACITY AND, IF THE MAGISTRATE MAKES THAT DETERMINATION, BENEFITS SHALL BE BASED ON HIS OR HER WAGE AT THE ORIGINAL DATE OF INJURY. IF THE MAGISTRATE DOES NOT MAKE THAT DETERMINATION, THE EMPLOYEE IS PRESUMED TO HAVE ESTABLISHED A POST-INJURY WAGE EARNING CAPACITY AND BENEFITS SHALL NOT BE PAID BASED ON THE WAGE AT THE ORIGINAL DATE OF INJURY.

(*iii*) ~~If the employee becomes reemployed and the employee is~~

~~still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).~~ **IF THE EMPLOYEE WAS EMPLOYED FOR 250 WEEKS OR MORE, THE EMPLOYEE IS CONCLUSIVELY PRESUMED TO HAVE ESTABLISHED A POST-INJURY WAGE EARNING CAPACITY.**

~~(c) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury.~~

~~(6) A carrier shall notify the Michigan employment security commission of the name of any injured employee who is unemployed and to which the carrier is paying benefits under this act.~~

~~(7) The Michigan employment security commission shall give priority to finding employment for those persons whose names are supplied to the commission under subsection (6).~~

(8) The Michigan ~~employment security commission~~ **UNEMPLOYMENT INSURANCE AGENCY** shall notify the bureau in writing of the name of any employee who refuses any bona fide offer of reasonable employment. Upon notification to the bureau, the bureau shall notify the carrier who shall terminate the benefits of the employee pursuant to subsection ~~(5)(a)~~ **(7)(A)**.

(9) "Reasonable employment", as used in this section, means work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence. ~~The employee's capacity to perform shall not be limited to jobs in work suitable to his or her qualifications and training.~~

(10) Weekly benefits ~~shall not be~~ **ARE NOT** payable during the

period of confinement to a person who is incarcerated in a penal institution for violation of the criminal laws of this state or who is confined in a mental institution pending trial for a violation of the criminal laws of this state, if the violation or reason for the confinement occurred while at work and is directly related to the claim. **WEEKLY BENEFITS ARE NOT PAYABLE DURING THE PERIOD OF IMPRISONMENT FOLLOWING SENTENCING FOR A CRIME, IF THE EMPLOYEE IS UNABLE TO OBTAIN EMPLOYMENT OR PERFORM WORK BECAUSE OF THAT IMPRISONMENT.**

(11) A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

~~(12) This section shall apply to personal injuries and work related diseases occurring on or after June 30, 1985.~~

SEC. 306. (1) FOR A MEMBER OF A FULL PAID FIRE DEPARTMENT OF AN AIRPORT RUN BY A COUNTY ROAD COMMISSION IN COUNTIES OF 1,000,000 POPULATION OR MORE OR BY A STATE UNIVERSITY OR COLLEGE OR OF A FULL PAID FIRE OR POLICE DEPARTMENT OF A CITY, TOWNSHIP, OR INCORPORATED VILLAGE EMPLOYED AND COMPENSATED UPON A FULL-TIME BASIS, A COUNTY SHERIFF AND THE DEPUTIES OF THE COUNTY SHERIFF, MEMBERS OF THE STATE POLICE, CONSERVATION OFFICERS, AND MOTOR CARRIER INSPECTORS OF THE MICHIGAN PUBLIC SERVICE COMMISSION, "PERSONAL INJURY" SHALL BE CONSTRUED TO INCLUDE RESPIRATORY AND HEART DISEASES OR ILLNESSES RESULTING FROM THOSE DISEASES THAT DEVELOP OR MANIFEST THEMSELVES WHILE THE INDIVIDUAL IS IN ACTIVE SERVICE AND THAT RESULT FROM

PERFORMING DUTIES IN THE COURSE OF EMPLOYMENT.

(2) RESPIRATORY AND HEART DISEASES OR ILLNESSES RESULTING FROM THOSE DISEASES AS DESCRIBED IN SUBSECTION (1) ARE CONSIDERED TO ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT IN THE ABSENCE OF EVIDENCE TO THE CONTRARY.

(3) AS A CONDITION PRECEDENT TO FILING AN APPLICATION FOR BENEFITS AND SUBJECT TO SECTION 354(12), THE CLAIMANT, IF HE OR SHE IS DESCRIBED IN SUBSECTION (1), SHALL FIRST APPLY FOR, AND DO ALL THINGS NECESSARY TO QUALIFY FOR, ANY PENSION BENEFITS TO WHICH HE OR SHE, OR HIS OR HER DECEDENT, MAY BE ENTITLED. IF A FINAL DETERMINATION IS MADE THAT PENSION BENEFITS SHALL NOT BE AWARDED, THEN THE PRESUMPTION OF "PERSONAL INJURY" AS PROVIDED IN SUBSECTION (2) APPLIES. THE EMPLOYER OR EMPLOYEE MAY REQUEST 2 COPIES OF THE DETERMINATION DENYING PENSION BENEFITS, 1 COPY OF WHICH MAY BE FILED WITH THE BUREAU.

Sec. 315. (1) The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. However, an employer is not required to reimburse or cause to be reimbursed charges for an optometric service unless that service was included in the definition of practice of optometry under section 17401 of the public health code, 1978 PA 368, MCL 333.17401, as of May 20, 1992 or for a chiropractic service unless that service was included in the definition of practice of chiropractic under section 16401 of the public health

code, 1978 PA 368, MCL 333.16401, as of January 1, 2009. An employer is not required to reimburse or cause to be reimbursed charges for services performed by a profession that was not licensed or registered by the laws of this state on or before January 1, 1998, but that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998. Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee's spouse, brother, sister, child, parent, or any combination of these persons. After ~~10~~ 90 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician. The employer or the employer's carrier may file a petition objecting to the named physician selected by the employee and setting forth reasons for the objection. If the employer or carrier can show cause why the employee should not continue treatment with the named physician of the employee's choice, after notice to all parties and a prompt hearing by a worker's compensation magistrate, the worker's compensation magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician from the date the order is mailed. The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. If the employer fails, neglects, or refuses so to

do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee. **ATTORNEY FEES RELATED TO MEDICAL EXPENSES ARE CHARGEABLE TO EITHER THE EMPLOYEE OR THE MEDICAL PROVIDER, OR BOTH, BUT ARE NOT CHARGEABLE TO THE EMPLOYER OR CARRIER.**

(2) Except as otherwise provided in subsection (1), all fees and other charges for any treatment or attendance, service, devices, apparatus, or medicine under subsection (1), are subject to rules promulgated by the workers' compensation agency pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The rules promulgated shall establish schedules of maximum charges for the treatment or attendance, service, devices, apparatus, or medicine, which schedule shall be annually revised. A health facility or health care provider shall be paid either its usual and customary charge for the treatment or attendance, service, devices, apparatus, or medicine, or the maximum charge established under the rules, whichever is less.

(3) The director of the workers' compensation agency shall provide for an advisory committee to aid and assist in establishing the schedules of maximum charges under subsection (2) for charges or fees that are payable under this section. The advisory committee shall be appointed by and serve at the pleasure of the director.

(4) If a carrier determines that a health facility or health

care provider has made any excessive charges or required unjustified treatment, hospitalization, or visits, the health facility or health care provider shall not receive payment under this chapter from the carrier for the excessive fees or unjustified treatment, hospitalization, or visits, and is liable to return to the carrier the fees or charges already collected. The workers' compensation agency may review the records and medical bills of a health facility or health care provider determined by a carrier to not be in compliance with the schedule of charges or to be requiring unjustified treatment, hospitalization, or office visits.

(5) As used in this section, "utilization review" means the initial evaluation by a carrier of the appropriateness in terms of both the level and the quality of health care and health services provided an injured employee, based on medically accepted standards. A utilization review shall be accomplished by a carrier pursuant to a system established by the workers' compensation agency that identifies the utilization of health care and health services above the usual range of utilization for the health care and health services based on medically accepted standards and provides for acquiring necessary records, medical bills, and other information concerning the health care or health services.

(6) By accepting payment under this chapter, a health facility or health care provider shall be considered to have consented to submitting necessary records and other information concerning health care or health services provided for utilization review pursuant to this section. The health facilities and health care providers shall be considered to have agreed to comply with any

decision of the workers' compensation agency pursuant to subsection (7). A health facility or health care provider that submits false or misleading records or other information to a carrier or the workers' compensation agency is guilty of a misdemeanor punishable by a fine of not more than $1,000.00 or by imprisonment for not more than 1 year, or both.

(7) If it is determined by a carrier that a health facility or health care provider improperly overutilized or otherwise rendered or ordered inappropriate health care or health services, or that the cost of the health care or health services was inappropriate, the health facility or health care provider may appeal to the workers' compensation agency regarding that determination pursuant to procedures provided for under the system of utilization review.

(8) The criteria or standards established for the utilization review shall be established by rules promulgated by the workers' compensation agency. A carrier that complies with the criteria or standards as determined by the workers' compensation agency shall be certified by the department.

(9) If a health facility or health care provider provides health care or a health service that is not usually associated with, is longer in duration in time than, is more frequent than, or extends over a greater number of days than that health care or service usually does with the diagnosis or condition for which the patient is being treated, the health facility or health care provider may be required by the carrier to explain the necessity or indication for the reasons why in writing.

Sec. 331. ~~The following persons shall be conclusively presumed~~

~~to be wholly dependent for support upon a deceased employee:~~

~~(a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, a worker's compensation magistrate shall find the wife was living apart for justifiable cause or because he had deserted her.~~

~~(b) A~~ **EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, A** child under the age of 16 years, or **16 YEARS OR** over ~~16 years of age~~ if physically or mentally incapacitated from earning, **IS CONCLUSIVELY PRESUMED TO BE WHOLLY DEPENDENT FOR SUPPORT** upon the parent with whom he or she is living at the time of the death of that parent. In the event of the death of an employee who has at the time of death a living child by a former spouse or a child who has been deserted by ~~such~~ **THE** deceased employee under the age of 16 years, or over if physically or mentally incapacitated from earning, ~~such~~ **THAT** child shall be conclusively presumed to be wholly dependent for support upon the deceased employee, even though not living with the deceased employee at the time of death. ~~and in all cases the~~ **THE** death benefit shall be divided ~~between or among the surviving spouse and all the children of the deceased employee, and all other persons, if any,~~ **AMONG ALL PERSONS** who are wholly dependent upon the deceased employee, in equal shares. ~~the surviving spouse taking the same share as a child. In all cases mentioned in this section the~~ **THE** total sum due a surviving spouse and his or her own children shall be paid directly to the surviving spouse for his or her own use, and for the use and benefit of his or her own children. If during the time compensation payments ~~shall~~ continue, a worker's compensation magistrate ~~shall find~~ **FINDS** that the

surviving spouse is not properly caring for ~~such~~ **THOSE** children, the worker's compensation magistrate shall order the shares of ~~such~~ **THE** children to be thereafter paid to their guardian or legal representative for their use and benefit, instead of to their father or mother. In all cases the sums due to the children by the former spouse of the deceased employee shall be paid to their guardians or legal representatives for the use and benefit of ~~such~~ **THOSE** children. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the ~~fact, as the fact may be~~ **FACTS** at the time of the injury. ~~Where~~ **IF** a deceased employee leaves a person wholly dependent upon him or her for support, ~~such~~ **THAT** person shall be entitled to the whole death benefit and persons partially dependent, if any, shall receive no part thereof, while the person wholly dependent is living. All persons wholly dependent upon a deceased employee, whether by conclusive presumption or as a matter of fact, shall be entitled to share equally in the death benefit in accordance with the provisions of this section. If there is no one wholly dependent or if the death of all persons wholly dependent ~~shall occur~~ **OCCURS** before all compensation is paid, and there is ~~but~~ **ONLY** 1 person partially dependent, ~~such~~ **THAT** person ~~shall be~~ **IS** entitled to compensation according to the extent of his or her dependency; and if there is more than 1 person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency. A person shall not be considered a dependent unless he or she is a member of the family of the deceased employee, or unless such person bears to the deceased

employee the relation of widower or widow, lineal descendant, ancestor, or brother or sister.

Sec. 353. (1) For the purposes of sections 351 to 361, dependency shall be determined as follows:

~~(a) The following shall be conclusively presumed to be dependent for support upon an injured employee:~~

~~(*i*) The wife of an injured employee living with such employee as such wife at the time of the injury.~~

(A) ~~(*ii*)~~ A child under the age of 16 years, or **16 YEARS OR** over ~~said age,~~ if physically or mentally incapacitated from earning, living with his parent at the time of the injury of ~~such~~ **THAT** parent.

(b) In all other cases questions of dependency shall be determined in accordance with the ~~fact, as the fact may be~~ **FACTS** at the time of the injury, except as provided in subsection (3). ~~No person shall~~ **A PERSON SHALL NOT** be considered a dependent unless he **OR SHE** is a member of the family of the injured employee, or unless ~~such~~ **THE** person bears to ~~such~~ **THE** injured employee the relation of husband or wife, or lineal descendent, or ancestor or brother or sister. Except as to ~~those~~ **A PERSON** conclusively presumed to be ~~dependents, no person shall be deemed a dependent who~~ **A DEPENDENT, A PERSON WHO** receives less than 1/2 of his **OR HER** support from an injured employee **SHALL NOT BE CONSIDERED TO BE A DEPENDENT.**

(2) Weekly payments to an injured employee shall be reduced by the additional amount provided for any dependent child or spouse or other dependent when ~~such~~ **THE** child either reaches the age of 18 years or after becoming 16 ceases for a period of 6 months to

receive more than 1/2 of his **OR HER** support from ~~such~~ **THE** injured employee, if at ~~such~~ **THAT** time ~~he~~ **THE CHILD** is neither physically nor mentally incapacitated from earning; ~~, or when such~~ **WHEN THE** spouse ~~shall be~~ **IS** divorced by final decree from his **OR HER** injured spouse; ~~,~~ or when ~~such~~ **THE** child, spouse, or other dependent ~~shall be~~ **IS** deceased.

(3) An increase in payments shall be made for increased numbers of conclusive dependents as defined in this act **WHO WERE** not ~~so~~ dependent at the time of the injury of an employee.

Sec. 354. (1) This section ~~is applicable when~~ **APPLIES IF** either weekly or lump sum payments are made to an employee as a result of liability ~~pursuant to~~ **UNDER** section 351, 361, or 835 with respect to the same time period for which **THE EMPLOYEE ALSO RECEIVED OR IS RECEIVING** old-age insurance benefit payments under the social security act, 42 ~~U.S.C.~~ **USC** 301 to 1397f; payments under a self-insurance plan, a wage continuation plan, or a disability insurance policy provided by the employer; or pension or retirement payments ~~pursuant to~~ **UNDER** a plan or program established or maintained by the employer. ~~, are also received or being received by the employee.~~ Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts:

(a) Fifty percent of the amount of the old-age insurance benefits received or being received under the social security act.

(b) The after-tax amount of the payments received or being received under a self-insurance plan, a wage continuation plan, or

under a disability insurance policy provided by the same employer from whom benefits under section 351, 361, or 835 are received if the employee did not contribute directly to the plan or to the payment of premiums regarding the disability insurance policy. If ~~such~~ **THE** self-insurance plans, wage continuation plans, or disability insurance policies are entitled to repayment in the event of a worker's compensation benefit recovery, the carrier shall satisfy ~~such~~ **THAT** repayment out of funds the carrier has received through the coordination of benefits provided for under this section. Notwithstanding the provisions of this subsection, attorney fees shall be paid pursuant to section 821 to the attorney who secured the worker's compensation recovery.

(c) The proportional amount, based on the ratio of the employer's contributions to the total insurance premiums for the policy period involved, of the after-tax amount of the payments received or being received by the employee pursuant to a disability insurance policy provided by the same employer from whom benefits under section 351, 361, or 835 are received, if the employee did contribute directly to the payment of premiums regarding the disability insurance policy.

(d) ~~The~~ **SUBJECT TO SUBSECTION (12), THE** after-tax amount of the pension or retirement payments received or being received **BY THE EMPLOYEE, OR WHICH THE EMPLOYEE IS ELIGIBLE TO RECEIVE,** pursuant to a plan or program established or maintained by the same employer from whom benefits under section 351, 361, or 835 are received, if the employee did not contribute directly to the pension or retirement plan or program. Subsequent increases in a

pension or retirement program shall not affect the coordination of these benefits.

(e) The proportional amount, based on the ratio of the employer's contributions to the total contributions to the plan or program, of the after-tax amount of the pension or retirement payments received or being received by the employee pursuant to a plan or program established or maintained by the same employer from whom benefits under section 351, 361, or 835 are received, if the employee did contribute directly to the pension or retirement plan or program. Subsequent increases in a pension or retirement program shall not affect the coordination of these benefits.

(f) For those employers who do not provide a pension plan, the proportional amount, based on the ratio of the employer's contributions to the total contributions made to a qualified profit sharing plan under section 401(a) of the internal revenue code or any successor to section 401(a) of the internal revenue code covering a profit sharing plan which provides for the payment of benefits only upon retirement, disability, death, or other separation of employment to the extent that benefits are vested under the plan.

(2) To satisfy any remaining obligations under section 351, 361, or 835, the employer shall pay or cause to be paid to the employee the balance due in either weekly or lump sum payments after the application of subsection (1).

(3) In the application of subsection (1) any credit or reduction shall occur pursuant to this section and all of the following:

(a) The bureau shall promulgate rules to provide for notification by an employer or carrier to an employee of possible eligibility for social security benefits and the requirements for establishing proof of application for those benefits. Notification shall be promptly mailed to the employee after the date on which by reason of age the employee may be entitled to social security benefits. A copy of the notification of possible eligibility shall be filed with the bureau by the employer or carrier.

(b) Within 30 days after receipt of the notification of possible employee eligibility the employee shall:

(*i*) Make application for social security benefits.

(*ii*) Provide the employer or carrier with proof of that application.

(*iii*) Provide the employer or carrier with an authority for release of information which shall be utilized by the employer or carrier to obtain necessary benefit entitlement and amount information from the social security administration. The authority for release of information shall be effective for 1 year.

(4) ~~Failure of~~ **IF** the employee **FAILS** to provide the proof of application or the authority for release of information as prescribed in subsection (3), ~~shall allow~~ the employer or carrier, with the approval of the bureau, ~~to~~ **MAY** discontinue the compensation benefits payable to the employee under section 351, 361, or 835 until the proof of application and the authority for release of information is provided. Compensation benefits withheld shall be reimbursed to the employee upon the providing of the required proof of application, or the authority for release of

information, or both.

(5) If the employer or carrier is required to submit a new authority for release of information to the social security administration in order to receive information necessary to comply with this section, the employee shall provide the new authority for release of information within 30 days of a request by the employer or carrier. ~~Failure~~ **IF THE EMPLOYEE FAILS** to provide the new authority for release of information, ~~shall allow~~ the employer or carrier, with the approval of the bureau, ~~to~~ **MAY** discontinue benefits until the authority for release of information is provided as prescribed in this subsection. Compensation benefits withheld shall be reimbursed to the employee upon the providing of the new authority for release of information.

(6) Within 30 days after either the date of first payment of compensation benefits under section 351, 361, or 835, or 30 days after the date of application for any benefit under subsection (1)(b), (c), (d), or (e), whichever is later, the employee shall provide the employer or carrier with a properly executed authority for release of information, which shall be utilized by the employer or carrier to obtain necessary benefit entitlement and amount information from the appropriate source. The authority for release of information is effective for 1 year. Failure of the employee to provide a properly executed authority for release of information shall allow the employer or carrier with the approval of the bureau to discontinue the compensation benefits payable under section 351, 361, or 835 to the employee until the authority for release of information is provided. Compensation benefits withheld shall be

reimbursed to the employee upon providing the required authority for release of information. If the employer or carrier is required to submit a new authority for release of information to the appropriate source in order to receive information necessary to comply with this section, the employee shall provide a properly executed new authority for release of information within 30 days after a request by the employer or carrier. Failure of the employee to provide a properly executed new authority for release of information shall allow the employer or carrier with the approval of the bureau to discontinue benefits under section 351, 361, or 835 until the authority for release of information is provided as prescribed in this subsection. Compensation benefits withheld shall be reimbursed to the employee upon the providing of the new authority for release of information.

(7) A credit or reduction under this section shall not occur because of an increase granted by the social security administration as a cost of living adjustment.

(8) Except as provided in subsections (4), (5), and (6), a credit or reduction of benefits otherwise payable for any week shall not be taken under this section until there has been a determination of the benefit amount otherwise payable to the employee under section 351, 361, or 835 and the employee has begun receiving the benefit payments.

(9) Except as otherwise provided in this section, any benefit payments under the social security act, or any fund, policy, or program as specified in subsection (1) ~~which~~ **THAT** the employee has received or is receiving after March 31, 1982 and during a period

in which the employee was receiving unreduced compensation benefits under section 351, 361, or 835 shall be considered to have created an overpayment of compensation benefits for that period. The employer or carrier shall calculate the amount of the overpayment and send a notice of overpayment and a request for reimbursement to the employee. Failure by the employee to reimburse the employer or carrier within 30 days after the mailing date of the notice of request for reimbursement shall allow the employer or carrier with the approval of the bureau to discontinue 50% of future weekly compensation payments under section 351, 361 or 835. The compensation payments withheld shall be credited against the amount of the overpayment. Payment of the appropriate compensation benefit shall resume when the total amount of the overpayment has been withheld.

(10) The employer or carrier taking a credit or making a reduction as provided in this section shall immediately report to the bureau the amount of any credit or reduction, and as requested by the bureau, furnish to the bureau satisfactory proof of the basis for a credit or reduction.

(11) Disability insurance benefit payments under the social security act shall be considered to be payments from funds provided by the employer and to be primary payments on the employer's obligation under section 351, 361, or 835 as old-age benefit payments under the social security act are considered pursuant to this section. The coordination of social security disability benefits shall commence on the date of the award certificate of the social security disability benefits. Any accrued social security

disability benefits shall not be coordinated. However, social security disability insurance benefits shall only be so considered if section 224 of the social security act, 42 ~~U.S.C.~~ **USC** 424a, is revised so that a reduction of social security disability insurance benefits is not made because of the receipt of worker's compensation benefits by the employee.

(12) Nothing in this section shall be considered to compel an employee to apply for early federal social security old-age insurance benefits or to apply for early or reduced pension or retirement benefits.

(13) As used in this section, "after-tax amount" means the gross amount of any benefit under subsection (1)(b), (1)(c), (1)(d), or (1)(e) reduced by the prorated weekly amount which would have been paid, if any, under the federal insurance contributions act, 26 ~~U.S.C.~~ **USC** 3101 to ~~3126,~~ **3128, AND** state income tax and federal income tax, calculated on an annual basis using as the number of exemptions the disabled employee's dependents plus the employee, and without excess itemized deductions. In determining the "after-tax amount" the tables provided for in section 313(2) shall be used. The gross amount of any benefit under subsection (1)(b), (1)(c), (1)(d), or (1)(e) shall be presumed to be the same as the average weekly wage for purposes of the table. The applicable 80% of after-tax amount as provided in the table will be multiplied by 1.25 which will be conclusive for determining the "after-tax amount" of benefits under subsection (1)(b), (1)(c), (1)(d), or (1)(e).

(14) This section does not apply to any payments received or

to be received under a disability pension plan provided by the same employer, which plan is in existence on March 31, 1982. Any disability pension plan entered into or renewed after March 31, 1982 may provide that the payments under that disability pension plan provided by the employer shall not be coordinated pursuant to this section.

(15) With respect to volunteer fire fighters, volunteer safety patrol officers, volunteer civil defense workers, and volunteer ambulance drivers and attendants who are considered employees for purposes of this act pursuant to section 161(1)(a), the reduction of weekly benefits provided for disability insurance payments under subsection (1)(b) and (c) and subsection (11) may be waived by the employer. An employer that is not a self-insurer may make the waiver provided for under this subsection only at the time a worker's compensation insurance policy is entered into or renewed.

(16) This section ~~shall~~ **DOES** not apply to payments made to an employee as a result of liability pursuant to section 361(2) and (3) for the specific loss period set forth therein. It is the intent of the legislature that, because benefits under section 361(2) and (3) are benefits which recognize human factors substantially in addition to the wage loss concept, coordination of benefits should not apply to such benefits.

(17) The decision of the Michigan Supreme Court in Franks v White Pine Copper Division, 422 Mich 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to

section 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of ~~this~~ **THE** amendatory act **THAT ADDED THIS SUBSECTION** to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose.

(18) This section applies only to payments resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring on or after March 31, 1982. Any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have not been coordinated under this section as of the effective date of this subsection shall not be coordinated, shall not be considered to have created an overpayment of compensation benefits, and shall not be subject to reimbursement to the employer or carrier.

(19) Notwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before ~~the effective date of this subsection~~ **MAY 14, 1987** shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, ~~within 60 days of the effective date of this subsection,~~ **BY JULY 13, 1987,** to the employee by the employer or carrier.

(20) Notwithstanding any other section of this act, any employee who has paid an employer or carrier money alleged by the employer or carrier to be owed the employer or carrier because that employee's benefits had not been coordinated under this section and

whose date of personal injury was before March 31, 1982 shall be reimbursed with interest, ~~within 60 days of the effective date of this subsection,~~ **BY JULY 13, 1987,** that money by the employer or carrier.

(21) If any portion of this section is subsequently found to be unconstitutional or in violation of applicable law, it shall not affect the validity of the remainder of this section.

Sec. 360. (1) A person who suffers an injury arising out of and in the course of employment as a professional athlete ~~shall be~~ **IS** entitled to weekly benefits only when the person's average weekly wages in all employments at the time of application for benefits, and thereafter, as computed in accordance with section 371, are less than 200% of the state average weekly wage.

~~(2) This section~~ **THIS SUBSECTION** shall not be construed to prohibit an otherwise eligible person from receiving benefits under section 315, 319, or 361.

(2) A PROFESSIONAL ATHLETE WHO IS HIRED UNDER A CONTRACT WITH AN EMPLOYER OUTSIDE OF THIS STATE IS EXCEPTED FROM THE PROVISIONS OF THIS ACT IF ALL OF THE FOLLOWING CONDITIONS APPLY:

(A) THE ATHLETE SUSTAINS A PERSONAL INJURY ARISING OUT OF THE COURSE OF EMPLOYMENT WHILE THE PROFESSIONAL ATHLETE IS TEMPORARILY WITHIN THIS STATE.

(B) THE EMPLOYER HAS OBTAINED WORKER'S COMPENSATION INSURANCE COVERAGE UNDER THE WORKER'S COMPENSATION LAW OF ANOTHER STATE THAT COVERS THE INJURY IN THIS STATE.

(C) THE OTHER STATE RECOGNIZES THE EXTRATERRITORIAL PROVISIONS OF THIS ACT AND PROVIDES A RECIPROCAL EXEMPTION FOR PROFESSIONAL

ATHLETES WHOSE INJURIES ARISE OUT OF EMPLOYMENT WHILE TEMPORARILY IN THAT STATE AND ARE COVERED BY THE WORKER'S COMPENSATION LAW OF THIS STATE.

(3) THE BENEFITS AND OTHER REMEDIES UNDER THE WORKER'S COMPENSATION LAWS OF ANOTHER STATE ARE THE EXCLUSIVE REMEDY AGAINST THE EMPLOYER UNDER THE CONDITIONS IN SUBSECTION (2). A CERTIFICATE FROM THE DULY AUTHORIZED OFFICER OF ANOTHER STATE CERTIFYING THAT THE EMPLOYER IS INSURED IN THAT STATE AND HAS OBTAINED EXTRATERRITORIAL COVERAGE INSURING THE EMPLOYER'S PROFESSIONAL ATHLETES IN THIS STATE IS PRIMA FACIE EVIDENCE THAT THE EMPLOYER HAS OBTAINED INSURANCE MEETING THE REQUIREMENTS FOR THE EXCEPTION TO COVERAGE UNDER THIS ACT UNDER SUBSECTION (2).

Sec. 361. (1) While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.

(2) In cases included in the following schedule, the disability in each case shall be considered to continue for the

period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act. ~~for the loss of the following:~~**THE EFFECT OF ANY JOINT REPLACEMENT SURGERY, IMPLANT, OR OTHER MEDICAL PROCEDURE SHALL BE CONSIDERED IN DETERMINING WHETHER A LOSS HAS OCCURRED. THE DISABILITY PERIOD FOR THE LOSS SHALL BE CONSIDERED AS FOLLOWS:**

(a) Thumb, 65 weeks.

(b) First finger, 38 weeks.

(c) Second finger, 33 weeks.

(d) Third finger, 22 weeks.

(e) Fourth finger, 16 weeks.

The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of 1/2 of that thumb or finger, and compensation shall be 1/2 of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.

(f) Great toe, 33 weeks.

(g) A toe other than the great toe, 11 weeks.

The loss of the first phalange of any toe shall be considered to be equal to the loss of 1/2 of that toe, and compensation shall be 1/2 of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire toe.

(h) Hand, 215 weeks.

(i) Arm, 269 weeks.

An amputation between the elbow and wrist that is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.

(j) Foot, 162 weeks.

(k) Leg, 215 weeks.

An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

(l) Eye, 162 weeks.

Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye.

(3) Total and permanent disability, compensation for which is provided in section 351 means:

(a) Total and permanent loss of sight of both eyes.

(b) Loss of both legs or both feet at or above the ankle.

(c) Loss of both arms or both hands at or above the wrist.

(d) Loss of any 2 of the members or faculties in ~~subdivisions~~ **SUBDIVISION** (a), (b), or (c).

(e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.

(f) Incurable insanity or imbecility.

(g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury.

(4) The amounts specified in this clause are all subject to the same limitations as to maximum and minimum as above stated. In case of the loss of 1 member while compensation is being paid for the loss of another member, compensation shall be paid for the loss of the second member for the period provided in this section. Payments for the loss of a second member shall begin at the conclusion of the payments for the first member.

Sec. 801. (1) Compensation shall be paid promptly and directly to the person entitled thereto and shall become due and payable on the fourteenth day after the employer has notice or knowledge of the disability or death, on which date all compensation then accrued shall be paid. Thereafter compensation shall be paid in weekly installments. Every carrier shall keep a record of all payments made under this act and of the time and manner of making the payments and shall furnish reports, based upon these records, to the bureau as the director may reasonably require.

(2) If weekly compensation benefits or accrued weekly benefits are not paid within 30 days after becoming due and payable ~~, in cases where~~ **AND** there is not an ongoing dispute, $50.00 per day shall be added and paid to the worker for each day over 30 days in which the benefits are not paid. Not more than $1,500.00 in total may be added pursuant to this subsection.

(3) If medical bills or **A** travel allowance ~~are~~ **IS** not paid within 30 days after the carrier has received notice of nonpayment by certified mail ~~, in cases where~~ **AND** there is no ongoing dispute, $50.00 or the amount of the bill due, whichever is less, shall be added and paid to the worker for each day over 30 days in which the

medical bills or travel allowance ~~are~~ **IS** not paid. Not more than $1,500.00 in total may be added pursuant to this subsection.

(4) For purposes of rate-making, daily charges paid under subsection (2) shall not constitute elements of loss.

(5) An employer who has notice or knowledge of the disability or death and fails to give notice to the carrier shall pay the penalty provided for in subsection (2) for the period during which the employer failed to notify the carrier.

(6) When weekly compensation is paid pursuant to an award of a worker's compensation magistrate, an arbitrator, the board, the appellate commission, or a court, interest on the compensation shall be paid at the rate ~~of 10% per annum from the date each payment was due, until paid.~~**CALCULATED IN THE SAME MANNER AS PROVIDED FOR A MONEY JUDGMENT IN A CIVIL ACTION UNDER SECTION 6013(8) OF THE REVISED JUDICATURE ACT OF 1961, 1961 PA 236, MCL 600.6013(8).**

Enacting section 1. Chapter 4 of the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.401 to 418.441, is repealed.